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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 192

JOSHUA F. SIMONS, WILLIAM MARKOWITZ, AND SAMUEL MARKOWITZ, PETITIONERS

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1944–1999) is reported in 119 F. (2d) 539.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 21, 1941 (R. 1999–2000). Petition for rehearing was denied May 22, 1941 (R. 2000). The petition for writ of certiorari was filed June 19, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the accused may effectively consent to the completion of a jury trial before a substitute judge, when the first judge becomes incapacitated by illness after all the evidence has been introduced but before the jury has been instructed and final arguments completed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of Article III, Section 2 and the Sixth Amendment to the Constitution, relevant to the right to trial by jury in criminal cases, and of Section 24 of the Judicial Code relating to the jurisdiction of district courts, are set forth in the Appendix, *infra,* p. 13.

STATEMENT

Petitioners were convicted and sentenced in the United States District Court for the Western District of Washington, under an indictment charging violations of the Mail Fraud Statute (18 U. S. C. § 338) and the Securities and Exchange Act of 1933 (15 U. S. C. § 77 (q) (a) (1)) and for conspiracy to violate both acts (18 U. S. C. § 88) (R. 2–75).[1]

[1] Petitioners Joshua F. Simons and William Markowitz were convicted on all thirteen counts (R. 165–166), and were sentenced to imprisonment aggregating eight years and one day and to pay fines totalling $10,000 each (R. 183–193). Petitioner Samuel Markowitz was convicted on three counts (R. 166–167) and sentenced to imprisonment aggregating three years and one day (R. 181–182).

The trial commenced before Judge Cushman (R. 77), of the Western District of Washington, and after 127 witnesses were heard over a period of more than five months, the Government rested its case (R. 1828). None of the defendants testified or called any witnesses. After Government counsel's opening argument to the jury as well as arguments on behalf of two of the defendants had been presented, and while argument on behalf of a third defendant was in progress, the trial judge was stricken with a heart attack (R. 1844). When it became apparent that Judge Cushman would be unable to proceed (R. 1862), the parties appeared before the Honorable Leon R. Yankwich, District Judge of the United States for the Southern District of California, who had been duly authorized to preside over the District Court of the United States for the Western District of Washington (R. 78, 177, 236, 1844–1846). In open court, and with the benefit of advice of counsel, each petitioner indicated his desire that Judge Yankwich conclude the trial, and each waived "any question that may arise or could be raised by present or future counsel regarding the legality" of the substitution (R. 1847–1852, 1863–1869). Counsel for the petitioners in open court "approved" the substitution and stated, "the intention is to take no advantage whatever, to waive any possible claim of error on account of the substitution" (R. 1851–1853). Counsel for the Government thereupon consented to the substitution (R. 1853).

Then, by written stipulation, petitioners "being fully advised in the premises as to their legal and constitutional rights," requested that the trial "be completed" before Judge Yankwich and that he "preside in the trial of said cause, hear arguments of counsel for defendants and for the Government, instruct the jury, receive the verdict, sentence any and all defendants convicted, settle the Bill of Exceptions, and do any and all acts necessary and proper in the conduct of the trial of said cause and proceedings subsequent thereto as fully and completely as the said Honorable E. E. Cushman might or could do * * * waiving any and all legal and constitutional rights which they may have or might have by reason of the substitution * * *." Petitioners further stipulated that Judge Yankwich had been furnished a transcript of all the evidence and that he had "sufficient knowledge of the evidence to prepare the necessary instructions to the jury and to pass upon requested instructions" (R. 1859–1860).

The arguments to the jury were completed (R. 1869) with Judge Yankwich presiding, and he instructed the jury (R. 1869–1930). Following the jury's verdict of guilty, petitioners filed a motion for a new trial, which was denied, but the substitution of judges was not alleged as a ground for the motion (R. 168–179). On appeal to the Circuit Court of Appeals for the Ninth Circuit, petitioners assigned error upon the ground that Judge

Yankwich "had no jurisdiction" to complete the trial "and in so doing he violated" their rights under the Fifth Amendment to the Constitution (R. 396–397).

The Circuit Court of Appeals held that petitioners had waived any right they might have possessed to have the same judge preside throughout the trial and that the trial court had the power to give effect to the waiver.

ARGUMENT

The holding of the Circuit Court of Appeals that petitioners had validly waived any objections to the substitution of Judge Yankwich, is plainly correct and does not present any conflict of decisions warranting certiorari.

1. Petitioners contend that the constitutional guarantees of the right to trial by jury require the presence of a judge who is qualified (a) "to advise the jury on the facts" and (b) "to set aside the verdict * * * if, in his opinion, it is against the law or the evidence" (Pet. 10–14). Upon the assumption that Judge Yankwich was not qualified in either respect since he had not observed the demeanor of the Government's witnesses, they argue that his substitution—even at their express request—operated to deprive them of their right to a jury trial.

(a) We submit, however, that even if the right to the continuous presence of a judge who has

heard the testimony is an essential element of the right to trial by jury (see p. 7, *infra*) no reason appears why petitioners by their freely and intelligently given waiver could not forego that right. To have the same judge preside throughout the trial is no more vital to the right of the accused than the right to a verdict of twelve. Yet it is settled that an accused may "waive trial by a jury of twelve or consent to a trial by any lesser number, or by the court without a jury." *Patton* v. *United States,* 281 U. S. 276, 290. Similarly, an accused may waive other elements of a jury trial as defined by the Sixth Amendment which more directly reach his fundamental rights than does the substitution of judges.[2] If such rights may be waived, there can be no reason why the substitution of one qualified judge for another under the circumstances of this case should be forbidden.

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[2] Thus, he may waive his right to a "speedy trial," *Pietch* v. *United States*, 110 F. (2d) 817, 819 (C. C. A. 10th, 1940), certiorari denied, 310 U. S. 648; *Daniels* v. *United States*, 17 F. (2d) 339, 344 (C. C. A. 9th, 1927), certiorari denied, 274 U. S. 744; *Worthington* v. *United States*, 1 F. (2d) 154 (C. C. A. 7th, 1924), certiorari denied, 266 U. S. 626; *Phillips* v. *United States*, 201 Fed. 259, 262 (C. C. A. 8th, 1912); by a jury "of the state and district wherein the crime shall have been committed," *Hagner* v. *United States*, 54 F. (2d) 446, 447–449 (App. D. C., 1931), affirmed, 285 U. S. 427, "to be confronted with the witnesses against him," *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4th, 1925); certiorari denied, 268 U. S. 691; *Fukunaga* v. *Territory of Hawaii*, 33 F. (2d) 396, 397 (C. C. A. 9th, 1929), certiorari denied, 280 U. S. 593; and "to have the assistance of counsel

Freeman v. *United States*, 277 Fed. 732 (C. C. A. 2d), upon which petitioners rely as establishing a contrary rule (Pet. 7–8, 16), was plainly overruled by this Court in *Patton* v. *United States, supra*. As the court below pointed out (R. 1947), and as the Second Circuit has subsequently held, the *Freeman* case is based upon the premise that the accused may not waive the right to trial by jury, and that premise was "wholly removed" by the opinion of this Court in the *Patton* case. *Cahill* v. *Mayflower Bus Lines*, 7 F. Supp. 869, 872 (S. D. N. Y.); affirmed, 77 F. (2d) 838, 840 (C. C. A. 2d).

(b) Furthermore, the record explicitly shows that petitioners' waiver did not deprive them of the protection guaranteed by the jury trial provisions of the Constitution. It is clear that Judge Yank-

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for his defense." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463; *Williams* v. *Sanford*, 110 F. (2d) 526, 527 (C. C. A. 5th, 1940), certiorari denied, 310 U. S. 643; *Moore* v. *Hudspeth*, 110 F. (2d) 386, 388 (C. C. A. 10th, 1940), certiorari denied, 310 U. S. 643; *Harpin* v. *Johnston*, 109 F. (2d) 434, 435 (C. C. A. 9th, 1940), certiorari denied, 310 U. S. 624; *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10th, 1939), certiorari denied, 308 U. S. 553; *Zahn* v. *Hudspeth*, 102 F. (2d) 759, 761 (C. C. A. 10th, 1939), certiorari denied, 307 U. S. 642.

These requirements "are all of first importance" (*United States* v. *Wood*, 299 U. S. 123, 143), and were specifically enumerated in the Constitution because of the "anxiety of the people" that they be distinctly recognized "in the supreme law of the land." *Callan* v. *Wilson*, 127 U. S. 540, 549.

wich was fully qualified to comment on the evidence, had he chosen to depart from his usual custom not to do so (R. 112), and to set aside the verdict if the evidence had been insufficient to support it.[3] Petitioners expressly stipulated that he had "sufficient knowledge of the evidence to prepare the necessary instructions to the jury and to pass upon requested instructions" (R. 1860).

Moreover, while the Constitution requires "the superintendence of a judge" (*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13), it is not altogether clear that the right to trial by jury includes the right to have a judge qualified to comment upon the credibility of the witnesses, as petitioners assume (Pet. 12, 13). Full effect may be given to the requirement of superintendence by the presence of a qualified judge to conduct and control the trial (*The People* v. *Kelly*, 347 Ill. 221, 233 (1932)), and "to state or sum up the evidence." *Bannister* v. *Lucas*,

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[3] The record shows that Judge Yankwich "read the entire printed record in the case, including the exhibits" (R. 1864) and that he had the benefit of a draft of instructions prepared by Judge Cushman which were embodied in his charge (R. 1866). In their assignment of errors, petitioners complained of only one instruction given to the jury (R. 396), and that was challenged solely on legal grounds which in no way involve the credibility of testimony. And, since petitioners called no witnesses on their behalf, and each of the 127 witnesses for the Government testified to facts showing their guilt, there could have been no such conflict of testimony as would require the court to comment upon the witnesses' demeanor.

21 Hawaii 222, 233, 234 (1912).[4] Again, that the judge's opinion on the facts is not "a constituent part of the fundamental right" to trial by jury (*Bannister* v. *Lucas, supra,* p. 230) is apparent from the fact that in the great majority of jurisdictions judges are forbidden from commenting on the evidence. See, *Journal of the American Judicature Society,* October, 1928 (Vol. XII, No. 3, pp. 76–82).

Similarly, petitioners were obviously not prejudiced by the denial of their motion for a new trial based upon the insufficiency of the evidence (R. 168–169, 178), for they do not challenge the holding of the court below that (R. 1998–1999): "The undisputed evidence in the case, *entirely unattacked as to credibility* conformed to no other hypothesis than guilt." [Italics supplied.] In any event, as petitioners admit (Pet. 14), Section 776 of the Judicial Code specifically authorized him to rule on the motion, and the validity of that statute has been uniformly accepted.[5] Wholly apart from statute, it

[4] While it is sometimes loosely said that the "practice of such comment" was an "inseparable part of jury trial," at common law, *Wigmore on Evidence* (3rd ed.), § 2551; cf. *Quercia* v. *United States*, 289 U. S. 466, 468, 469, it is clear that at common law it was merely a practice which the judge could follow in his discretion, and not a matter of fundamental right which the accused could demand. *Smith* v. *Carrington*, 4 Cranch 62, 71.

[5] See *United States* v. *Meldrum*, 146 Fed. 390, 391–396 (D. C. Ore.), affirmed, 151 Fed. 177, 182 (C. C. A. 9th); *King* v. *United States*, 25 F. (2d) 242, 244 (C. C. A. 6th);

is generally held that a successor judge has the inherent power to rule upon a motion for a new trial, as long as a record of the proceedings has been preserved.[6]

2. Petitioners alternatively contend that Judge Yankwich was without statutory authority to complete the trial and that the consent of the parties was therefore ineffectual to confer jurisdiction upon him (Pet. 14–16). Petitioners do not deny, however, that the trial court had general jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C., § 41 (2)). "This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution." *Patton* v. *United States, supra,* p. 299. Since there is no constitutional nor statutory prohibition against the substitution of trial judges, the District Court had inherent power to give effect to the waiver[7]

Ziang Sun Wan v. *United States*, 289 Fed. 908, 914 (App. D. C.), reversed on other grounds, 266 U. S. 1; *Walker* v. *United States*, 113 F. (2d) 314, 316 (C. C. A. 9th); and compare *State* v. *Messino*, 325 Mo. 743, 753–760 (1930).

[6] *People* v. *Rao*, 271 N. Y. 98, 102, 103 (1936); *Commonwealth* v. *Gedzium*, 261 Mass. 299, 308 (1927); *People* v. *Genesee Circuit Judge*, 227 Mich. 538, 540 (1924); *The People* v. *McConnell*, 155 Ill. 192, 201 (1895); see *New York Life and Fire Insurance Co.* v. *Wilson*, 8 Pet. 291, 303.

[7] *Toledo, St. L. & W. R. Co.* v. *Perenchio*, 205 Fed. 472 (C. C. A. 7th), certiorari denied, 231 U. S. 745; *Bailey* v. *Texas Co.*, 47 F. (2d) 153, 155 (C. C. A. 2d).

and to proceed to the conclusion of the trial.[8] Obviously, the mere change of incumbents could not defeat the jurisdiction of the court.[9]

3. Finally, petitioners contend that they have been denied due process of law because the judgment of conviction was entered by a court which was not "fully organized and competent for the transaction of business" (Pet. 10, 17–18). We have shown, however, that the court had complete jurisdiction. There has been no deprivation of petitioners' constitutional rights, and the procedure followed plainly conformed to the requirements of due process.[10]

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[8] Cf. *Pointer* v. *United States*, 151 U. S. 396; *Chin Wah* v. *United States*, 13 F. (2d) 530 (C. C. A. 2d, 1926) *Ex parte Peterson*, 253 U. S. 300; *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642. See also *Ackerson* v. *United States*, 15 F. (2d) 268, 270 (C. C. A. 2d, 1926), certiorari denied, 273 U. S. 702.

[9] No contention is made that Judge Yankwich was not a regularly qualified United States Judge properly designated by the Senior Circuit Judge pursuant to R. S. §591 (R. 78, 1846, 1867), nor that petitioners' request that he complete the trial and their waivers of objections were incompetently made because of ignorance or duress upon them. Nor is it denied that either Judge Cushman or Judge Yankwich was present at all stages of the proceedings.

[10] Cf. *People* v. *Casselman*, 10 Cal. App. 234, 237 (1909); *People* v. *Henderson*, 28 Cal. 465, 474 (1865); *State* v. *McCray*, 189 Iowa 1239, 1243–1247 (1920); *Sergent* v. *Commonwealth*, 133 Ky. 284, 290, 291 (1909); and *Burrage* v. *State*, 101 Miss. 598, 605, 606 (1912). See also, *Mason* v. *State of Ohio*, 5 Ohio C. C. N. S. 113 (1904); *Com. of Pa.* v. *Claney*, 113 Pa. Super. Ct. 439 (1934); *Durden* v. *The People*, 192 Ill. 493; *Blend* v. *The People*, 41 N. Y. 604, 606 (1870).

CONCLUSION

The decision of the Circuit Court of Appeals is correct and does not present any conflict warranting certiorari. Therefore, it is respectfully submitted that the petition should be denied.

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JULY 1941.

APPENDIX

Article III, Section 2, of the Constitution of the United States provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. * * *

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section 24 of the Judicial Code, as amended (28 U. S. C., § 41), provides in part:

> The district courts shall have original jurisdiction as follows: * * *
>
> Second. Of all crimes and offenses cognizable under the authority of the United States.

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